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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 443

BUCKS COUNTY CABLE TV, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a–49a) is not yet officially reported. The opinion and order of the district court (Pet. App. 7a–32a) are reported at 299 F. Supp. 1325. The order of the district court denying rehearing (Pet. App. 33a–34a) is unreported. The opinion of the Commission (Pet. App. 1a–6a) is reported at 15 F.C.C. 2d 902.

## JURISDICTION

The judgments of the court of appeals (Pet. App. 50a, 51a–52a) were entered on June 4, 1970. The petition for a writ of certiorari was filed on July 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. (Supp. V) 2350.

## QUESTION PRESENTED

Whether Section 74.1105 of the Federal Communications Commission's CATV rules, which provides that upon the filing of objections, otherwise permissible CATV service may not begin until the Commission has considered the objections and approved the new service, is a valid exercise of the Commission's rule making powers.

## REGULATORY PROVISIONS INVOLVED

1. Commission Rule 74.1105(a), 47 CFR 74.1105(a), provides in pertinent part:

> No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60)

> days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. * * * * *

2. Commission Rule 74.1105(e), 47 CFR 74.1105(e), provides in pertinent part:

> Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; * * * * *.

3. Commission Rule 74.1109(a), 47 CFR 74.1109 (a), provides:

> Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

## STATEMENT

A community antenna television (CATV) system takes television signals off the air by means of specialized antennae and amplifies and transmits them on coaxial cable into the home television receivers of fee paying members of the public. Petitioner Bucks County Cable TV, Inc. (Bucks), has a CATV system

in Falls Township, Bucks County, Pennsylvania, a community located approximately ten miles from Philadelphia. Its operation is governed by rules (47 CFR 74.1100–74.1109) first adopted by the Commission in 1966 to control the distribution of television signals by CATV, particularly as it affects local UHF television stations in their competition for local audiences.[1] *United States* v. *Southwestern Cable Company*, 392 U.S. 157.

The rules prohibit importation by CATV systems of "distant signals"[2] into any of the 100 largest markets (such as the Philadelphia market in which Bucks' system lies) unless the Commission finds, after a full evidentiary hearing, that such signal extension is consistent with the maintenance of healthy local broadcast service. 47 CFR 74.1107. Because similar competitive dangers to local television inhere to some extent in a wide variety of other situations (including the transfer of signals, not technically "distant," between major markets whose signals overlap, such as New York and Philadelphia) the rules further allow local television stations, among others, to petition for additional restrictions. 47 C.F.R. 74.1109 (a). If such a petition is filed within 30 days after the notice that a CATV system is required to give

[1] *Second Report and Order*, 31 Fed. Reg. 4540; 2 F.C.C. 2d 725.

[2] A "distant signal" is a television signal carried beyond the Grade B contour of the originating station (47 CFR 74.1101(i)), an area within which a good picture may be expected at 50% of the locations 90% of the time. See *Sixth Report and Order*, 17 Fed. Reg. 3905, 3915.

before commencing operations (47 C.F.R. 74.1105(a)), the service challenged by the petition may not begin until the Commission has had an opportunity to consider the objections. 47 CFR 74.1105(c), 74.1109(a).[3] See *Second Report and Order*, 2 F.C.C. 2d 725, 786 n. 69. In effect, such a petition triggers an automatic stay.

Bucks obtained the municipal franchise for its system after the Commission first proposed these rules in 1965,[4] and did not decide to proceed with construction until six months after their adoption in March 1966 in the *Second Report and Order*. By June 17, 1968, the system was ready to operate (Pet. App. 11a).

On May 17, 1968, Bucks gave the required notice of its intention to commence operation, including its plans to carry the non-"distant" signals of four stations located in New York City. Several local UHF stations then filed timely petitions objecting to the proposed New York service, thus triggering the automatic stay provided for in Rule 74.1105(c). Among other things, the objecting stations pointed out that several months earlier the Commission had ordered an evidentiary

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[3] Usually such consideration has led to an evidentiary hearing in which objections to all CATV proposals for a given market would be consolidated and considered in terms of their total impact. See, *e.g.*, *Vision Cable Co.*, 14 F.C.C. 2d 651 (1968); *Buckeye Cablevision, Inc.*, 10 F.C.C. 2d 745 (1967); *National Cable Co., Inc.*, 10 F.C.C. 2d 613 (1967); *Fetzer Cable Vision*, 6 F.C.C. 2d 845 (1967); *Midwest Television, Inc.*, 4 F.C.C. 2d 612 (1966).

[4] *Notice of Inquiry and Notice of Proposed Rulemaking*, 1 F.C.C. 2d 453.

hearing to determine whether other CATV systems in the Philadelphia market could import signals from New York without impairing the development of UHF television in Philadelphia. *Delaware County Cable Television Co.*, 12 F.C.C. 2d 529 (1968). They argued that Bucks was in essentially the same position as the other systems and that its proposal should be consolidated with the others already in hearing. Bucks responded and the stations filed replies on August 7, 1968, thus completing the submissions. On October 23, 1968, however, Bucks initiated a new series of pleadings by petitioning for temporary relief from the automatic stay and seeking summary rejection of the UHF stations' objections. The stations again responded submitting their last filing, a motion to strike, on December 4, 1968 (Pet. App. 13a).

By this time the Commission had under consideration the adoption of more definitive rules to replace the case-by-case hearing approach to CATV service questions. On December 13, 1968, such a *Notice of Proposed Rule Making and Notice of Inquiry* was released (15 F.C.C. 2d 417). Under the new proposed rules a CATV system would be prohibited from importing signals from one major market into a community within 35 miles of the center of another major market without the consent of the originating broadcast station. Since Falls Township is less than ten miles from Philadelphia, the new rules would automatically bar Bucks from importing the New York City signals without the consent of the New York stations.

Pending final action on the proposed rule changes, the Commission suspended all action on CATV systems awaiting its approval, including proceedings such as Bucks' involving overlapping signals, and announced that new CATV operations would be authorized to commence only if "entirely consistent with the proposed rules."[5] 15 F.C.C. 2d 417 at 437–438, paras. 51 and 52. Only CATV systems lawfully in operation prior to December 20, 1968, the date of publication of the Notice in the Federal Register, were to be excused from meeting the standards of the new rules.

Since Bucks could not satisfy the proposed rules, it attempted to bring itself within the "grandfather" provision by beginning to distribute the New York signals on December 19, 1968. In view of the fact that objections of the UHF stations were still pending, Bucks' action was in clear violation of the stay provision of Rule 74.1105(c). Bucks attempted to meet this problem by commencing an action for declaratory judgment in the District Court for the Eastern District of Pennsylvania on December 24, 1968, alleging that the stay rule was unconstitutional, or that, even if reasonable on its face, it had been improperly and prejudicially applied to Bucks (Pet. App. 15a).

During the pendency of the District Court action, the Commission on January 22, 1969, issued its first order regarding the Bucks case. It denied Bucks' petition for temporary relief and consolidated the

[5] Retransmission consent was refused Bucks by three of the four New York stations, thus precluding the commencement of operations.

stations' objections for hearing with other pending CATV proposals to serve the Philadelphia market; it pointed out, however, that this proceeding would be governed by the provision of the December 13th notice of rule making under which all CATV hearings would be held in abeyance during the pendency of the rule making proceedings (Pet. App. 3a–4a). On February 12, 1969, Bucks filed three separate petitions for review in the court of appeals (under Section 402 (a) of the Communications Act) seeking review of this order, the stay provision and the notice of proposed rule making.

On March 28, 1969, the district court held that Section 74.1105(e) had been unconstitutionally applied to Bucks. It also granted a preliminary injunction against prosecution of Bucks for commencing carriage of the New York signals (Pet. App. 7a–34a). The government appealed and its appeal was consolidated with Bucks' petitions for review.

Ruling on the merits, the court of appeals reversed the district court and denied the petitions for review (Pet. App. 36a–49a). It held that the automatic stay provision in Section 74.1105(e) was not a delegation of injunctive power to complaining parties or an authorization for the issuance of an injunctive order without hearing, but was a legitimate exercise of the Commission's substantive rulemaking powers; that the agency had not been unreasonable in failing to dispose of the CHF stations' objections before the date when Bucks began operations in violation of the rules; that Bucks was on full notice of the risks it was taking before it

began construction; and that it had no vested right to a hearing under the procedures suspended by the Notice of December 13, 1969, since the Commission is empowered to deal with the complex and dynamic problems of CATV by general rules as well as by *ad hoc* determinations.

## ARGUMENT

The court below correctly held that the automatic stay provision in Rule 74.1105 is a valid exercise of the Federal Communications Commission's broad rule-making power to make rules regulating the nation's system of television distribution. The rule is a part of a system of regulation that continues to be developed and adapted as the Commission gains experience with the dynamically growing and changing CATV industry.[6] Because CATV is part of the na-

[6] Shortly after the interim procedures of December 12, 1968, were adopted (15 F.C.C. 2d 417) the Commission, on February 3 and 4, 1969, heard oral presentations from all interested persons. Thereafter certain modifications were made in the interim procedures (Memorandum Opinion and Order adopted May 14, 1969, 34 Fed. Reg. 7977) and the rules proposal was revised in a concurrently adopted *Further Notice of Proposed Rule Making* (34 Fed. Reg. 7981). Final rules on certain aspects of the proposal—"i.e. CATV program origination, its economic basis and the proposed equal time, sponsorship identification, and fairness requirements" were adopted on October 24, 1969, *First Report and Order*, FCC 69-1170, 34 Fed. Reg. 17651. On June 24, 1970, a *Second Report and Order*, FCC 70-673, 35 Fed. Reg. 10903, was adopted embodying the Commission's conclusions with respect to rules governing diversity of control over communications media. Further study was concurrently ordered as to specific aspects of media cross ownership (FCC 70-671, 35 Fed. Reg. 11042). On June 24, 1970, the Commis-

tion's system for distributing television signals, it is plainly affected with a strong public interest and subject to regulation to achieve the purposes of the Communications Act—particularly the equitable allocation of television signals. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157. The Commission's powers in this respect are necessarily comprehensive.

Rule 74.1105 provides that CATV service in certain situations may not be undertaken until the Commission has had an opportunity to determine its overall impact on the public interest in free, off-the-air television. In adopting the rule the Commission recognized the impracticality of withdrawing established service and found it essential that objections

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sion adopted a *Second Further Notice of Proposed Rule Making*, FCC 70-676, 35 Fed. Reg. 11015, in which an alternative method of dealing with the distant signal CATV problem was proposed on the basis of information gained during the interim period. This problem is closely tied to the ability of cable systems to obtain television programming without paying for it. Cf. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390; compare 17 U.S.C. 325(a). The Commission's most recent proposal, if adopted, would obviate the retransmission consent requirement of the December 15, 1969 notice (see p. 6, *supra*) and would generally permit the challenged carriage subject to certain limitations and affirmative obligations concerning programming and transmission of local stations' commercials. This aspect of the matter would also be significantly affected by congressional action with respect to S. 543, the copyright bill presently pending before the Senate Judiciary Committee, 91st Cong., 2d Sess., and S. 3635, 91st Cong., 2d Sess., dealing with jurisdictional aspects of CATV regulation.

be dealt with before service became entrenched. *Second Report and Order*, 2 F.C.C. 2d 725, 782. The question here, therefore, is not whether the Commission's rule constitutes an exercise of "injunctive" power without hearing, but whether it is an appropriate and reasonable exercise of the Commission's authority to adopt rules providing for definitive consideration of the public interest before new CATV service is launched.

Petitioner's objections have in substance been rejected by this Court's decision in *Southwestern Cable*, *supra*, and by decisions of other courts of appeals which have sustained the Commission's authority to impose such rules, *e.g.*, *Black Hills Video Corp. v. F.C.C.*, 399 F. 2d 65 (C.A. 8); *Teleprompter, Inc. v. United States*, 419 F. 2d 1047 (C.A. 6); *Buckeye Cablevision, Inc. v. F.C.C.*, 387 F. 2d 220 (C.A.D.C.). *Southwestern Cable* involved the FCC's power to issue an *ad hoc* stay order in an overlapping market case (Los Angeles-San Diego). Because the proposed CATV operation was not "new service" within the meaning of the rules, the automatic stay provisions of Rule 74.1105 did not apply; instead the

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The Commission follows a similar procedure, prescribed by statute (47 U.S.C. 309, 319), in handling license applications. Although CATVs are not licensees and therefore are not specifically governed by Sections 309 and 319, the general provisions of the Act (47 U.S.C. 154(i) and 303(r)) confer upon the Commission the power similarly to regulate through appropriate rules, as it has done here. *United States v. Southwestern Cable Co.*, *supra*. See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134.

stay was issued after a special hearing. This Court rejected the contention that the stay was a cease and desist order which could be issued only under the formal procedures the Act requires for such orders, and held that the Commission could, by administrative prohibition, bar expansion of CATV pending Commission consideration of the public interest although no rule or statute had been violated. The same rationale supports an automatic stay procedure defined by general rule as in Rule 74.1105.

In adopting Rule 74.1105 the FCC determined to suspend service in such special situations as overlapping non-"distant" markets (see 2 F.C.C. 2d at 786), only where local interests brought public interest objections to its attention, rather than prohibiting all new CATV services pending approval, as it did selectively in the case of importation of "distant" signals into the top 100 markets (47 C.F.R. 74.1107). Given the uncertainties then obtaining as to the economic impact of CATV service on local television, and the wide variety of market situations with which the Commission had to deal, this limited automatic stay rule was an eminently practical and fair way of safeguarding against possible injury to the viability of local television service.

Whether this kind of prohibition was to be imposed *ad hoc* as a preliminary to full adjudication, as in *Southwestern Cable*; or by general rule; or by a flexible combination of such procedures adapted to the nature of the industry, is a question committed by Congress to the Commission's responsible discre-

tion. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202–203; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421. The Commission's decision to proceed by a general rule that an *ad hoc* challenge triggers an automatic stay was adopted as part of the comprehensive rule-making summarized in the *Second Report and Order*. Since the rule is reasonably related to the purposes of the Act and was adopted in accordance with the requirements of law, the court below was correct in sustaining it. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39; *American Airlines, Inc., et al.* v. *C.A.B.*, 359 F. 2d 624, 628–631 (C.A.D.C.), certiorari denied, 385 U.S. 843; *WBEN, Inc.* v. *F.C.C.*, 396 F. 2d 601, 617–618 (C.A. 2, 1968), certiorari denied, 393 U.S. 914; *California Citizens Band, Inc.* v. *F.C.C.*, 375 F. 2d 43, 50–54 (C.A. 9), certiorari denied, 389 U.S. 844; compare *National Broadcasting Co.* v. *United States*, 319 U.S. 190.

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[5] The automatic stay provision in Rule 74.1105 is closely analogous to the Bank Merger and Bank Holding Company Acts, 12 U.S.C. (Supp. V) 1828(c)(7) and 1849(b), which each provide for an automatic stay of proposed bank acquisitions upon the filing of an antitrust suit within 30 days after banking agency approval of the transaction. See *United States* v. *First City Nat. Bank*, 386 U.S. 361, 370.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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